UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1407

FIRST TRANSIT, INC., SUCCESSOR TO RYDER/ATE, INC.

Petitioner/Cross-Respondent

V.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

The National Labor Relations Board ("the Board") had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) ("the Act"). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's final order issued against First Transit, Inc., successor to Ryder/ATE,

Inc. ("the Company"), on July 31, 2000. The Board's decision and order is reported at 331 NLRB No. 110. (A 308-316.)¹ The Company filed a petition for review on September 18, 2000. The Board filed its cross-application for enforcement on October 6, 2000. The petition for review and the cross-application for enforcement were timely as the Act imposes no time limitation on seeking review or enforcement of the Board's orders.

STATEMENT OF THE ISSUES PRESENTED

Whether the Board's order is entitled to summary enforcement because the Company does not contest the Board's findings that it changed its attendance policy without bargaining with the Union and then discharged employees pursuant to that new policy, both in violation of Section 8(a)(5) and (1) of the Act, and because Section 10(e) of the Act bars consideration of the Company's sole contention that the management-rights clause of the expired collective bargaining agreement privileged its otherwise unlawful unilateral action.

^{1.} References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the Act are reprinted in the Addendum to the Company's brief.

STATEMENT OF THE CASE

Pursuant to charges filed by Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL-CIO ("the Union"), with the Board's Regional Director on July 11 and September 19, 1997, the Board's General Counsel issued a complaint on June 14, 1998, alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally establishing a new attendance policy without first providing the Union notice and an opportunity to bargain, and by discharging employees pursuant to the new policy. (A 309; 3, 5, 7, 10-17.) An administrative law judge conducted a hearing on June 24, 1998, and issued a decision on December 29, 1998, finding (A 256-261) that the Company violated the Act as alleged. On limited exceptions filed by the Company, the Board affirmed the judge's findings by a decision issued on July 31, 2000. (A 308.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

In 1996, the Company was awarded a contract by Foothill Transit Services, Inc., to operate a part of the Foothill, California, bus transit system. (A 308, 310; 73.) That service previously had been provided by Laidlaw Transit Services, Inc. ("Laidlaw"). Laidlaw had a collective-bargaining agreement with the Union covering a unit of bus drivers. The Company began operations in Foothill using a majority of Laidlaw's former employees. (A 310; 75, 195.)

On February 18, 1997, the Company's general manager, Dennis Costello, met with the Union's business agent, Gilbert Baltazar. (A 310; 76.) At this meeting, the Company agreed to voluntarily recognize the Union, and to adopt the Union's contract with Laidlaw, which was set to expire on March 31. (A 310, 315; 68, 74, 77, 29, 222.) On March 17, the Company and the Union conducted their first bargaining session aimed at reaching an agreement to succeed the one expiring on March 31, 1997. (A 310; 85, 140-141, 180.) Representing the Union were Business Agents Baltazar and Lou Ippolito, and Shop Steward Michelle Woods. Representing the Company were General Manager Wayne Fritz and Vice President of Labor Relations Thomas Hock. (A 310; 85, 140, 157.) Additional bargaining meetings were held on March 25 and 26. At those meetings, the Laidlaw contract was reviewed article by article; no agreement was reached on a new contract. (A 310; 87-88, 141-142.) On March 31, the bargaining agreement expired. (A 310; 222.)

On April 21, the Company announced to its employees that new attendance rules would be imposed on April 24. (A 310; 170.) On April 23, Shop Steward

Woods called Business Agent Baltazar and told him that the Company was preparing to implement a new attendance policy. (A 310; 158-159.) Baltazar immediately called General Manager Fritz and left a voicemail message. When Fritz returned Baltazar's call, Baltazar asked him about the attendance policy. Fritz stated that a change was being made. He said that the Company was having severe attendance problems, a reference to 60-80 driver absences per week in March 1997, and that Foothill Transit threatened to penalize the Company \$750 for every missed trip under the liquidated damages clause of their contract. (A 310; 167-169.) Fritz told Baltazar that something had to be done immediately. (A 310; 89-90.) Baltazar responded, saying that while he understood the attendance problem, the proper course was for it to be discussed at the next negotiating meeting. Fritz insisted on implementing the new policy immediately. (A 310; 91.)

The Company implemented the new attendance policy on April 24. (A 250-252.) Prior to April 24, employees were discharged if they collected 10 unexcused absences within a 12-month period. (A 310; 115, 217.) Under the new policy, employees collected points for various attendance and tardiness infractions. The new policy provided for discharge when an employee collects 20 points in a 12-month period, or 10 points within a 90-day period. (A 310; A 250-252.)

On May 19, the Company and the Union met for another bargaining session.

At that meeting, certain language for a new bargaining agreement was finalized.

The new attendance policy was not discussed. The parties agreed to defer bargaining on economic items until after a pending decertification election was held. Ultimately, the Union won the election on June 20. (A 311; 92-93.)

In the meantime, on May 29, Shop Steward Woods was discharged pursuant to the new attendance policy. Around that same time, employee Edwin Lear was discharged pursuant to the new policy as well. The Union filed grievances on behalf of both employees. (A 311; 93-95, 248-249.) Maria Velasquez was fired pursuant to the new policy on September 22. (A 253-254.)

At the July 22 bargaining session, the Union presented General Manager Fritz with a proposed attendance policy. Fritz agreed to consider it. At an August 28 bargaining session, Fritz announced the Company's rejection of the Union's proposal, saying that the Company would "stick with the one [it had] implemented." (A 311; 97-98.) A new bargaining agreement was executed by the parties on October 22, 1997, effective November 1, 1997 through October 31, 2000. (A 311; 173-174.)

As of February 12, 1998, the Company had discharged 30 employees pursuant to the new attendance policy. (A 311; 100-101, 160, 253-255.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Fox, Liebman, and Hurtgen) affirmed the administrative law judge's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing a change in its attendance policy "without affording the Union an opportunity to bargain about the change and the effects of that change on bargaining unit employees." The Board also found that the Company violated Section 8(a)(5) and (1) by discharging employees Woods, Lear, and Velasquez pursuant to the unlawfully imposed policy, and by discharging, suspending or disciplining other employees pursuant to that policy. (A 308.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. (29 U.S.C. § 157) (A 308, 314-315.) Affirmatively, the order requires the Company to rescind the unilaterally imposed attendance policy and, upon request, to bargain with the Union over any material changes in the attendance policy. The order also requires the Company to remove from employees' files any disciplinary warnings, notices, or memoranda issued pursuant to the new attendance policy, and to reinstate and make whole any employees who were

discharged or otherwise disciplined under the policy. Finally, the order requires the Company to post an appropriate remedial notice. (A 308, 314-315.)

SUMMARY OF ARGUMENT

This case involves the Company's unilateral implementation of a change in its attendance policy, and its discharging and disciplining of employees pursuant to that new policy. The unilateral change occurred as the Company and Union bargained to reach a new agreement to succeed the 1996-1997 agreement that expired on March 30, 1997. Substantial evidence supports the Board's finding that by engaging in these acts, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). As the Board reasonably found, the Company was under an obligation to give notice and an opportunity to bargain to the Union before implementing changes in its attendance policy. Its failure to do so was patently unlawful.

The Company argues that it had no duty to bargain because the management-rights clause survived expiration of the 1996-1997 contract and operated to absolve the Company of any bargaining obligation regarding the attendance rules. However, because the Company did not make that argument before the Board, it is precluded from making it on appeal. Further, because the Company does not dispute the Board's other findings, the Board is entitled to summary enforcement of its order.

ARGUMENT

THE BOARD'S ORDER IS ENTITLED TO SUMMARY ENFORCEMENT BECAUSE THE COMPANY DOES NOT CONTEST THE BOARD'S FINDINGS THAT IT CHANGED ITS ATTENDANCE POLICY WITHOUT BARGAINING WITH THE UNION AND THEN DISCHARGED EMPLOYEES PURSUANT TO THAT NEW POLICY, BOTH IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT, AND BECAUSE SECTION 10(e) OF THE ACT BARS CONSIDERATION OF THE COMPANY'S SOLE CONTENTION THAT THE MANAGEMENT-RIGHTS CLAUSE OF THE EXPIRED COLLECTIVE-BARGAINING AGREEMENT PRIVILEGED ITS OTHERWISE UNLAWFUL UNILATERAL ACTION

A. Applicable Principles and the Board's Undisputed Findings

An employer has an obligation to give the bargaining representative of its employees notice of any proposed change in an established term or condition of employment, and an opportunity to bargain over that change. *Teamsters Local* 171 v. NLRB, 863 F.2d 946, 954 (D.C. Cir. 1988) (citing *First National* Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)), cert. denied sub nom. A.G. Boone Co. v. NLRB, 490 U.S. 1065 (1989). Thus, it is well settled that an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing new terms and conditions of employment without bargaining, including, "where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Accord Vincent Industrial Plastics, Inc.

v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000) (employer violated Section 8(a)(5) by unilaterally changing employment terms and conditions without presenting any proposals on those matters during bargaining negotiations). See also NLRB v. Katz, 369 U.S. 736, 743 (1962)(unilateral action absent a valid impasse in bargaining "is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal"). It is undisputed that an attendance policy, such as the one at issue here, is a term and condition of employment to which the statutory bargaining obligation attaches. See Vincent Industrial Plastics, Inc. v. NLRB, 209 F.3d 727 (D.C. Cir. 2000).

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951). Under the substantial evidence standard, a decision of "the Board is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary." Steelworkers Local 14534 v. NLRB, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 483-484 (1992)).

In its brief, the Company does not challenge the Board's findings (A 313) that it implemented a new attendance policy without providing the Union any notice or opportunity to bargain over the change.

Thus, it is uncontested that the Company notified its employees on April 21 that a new attendance policy would be imposed on April 24; that the Company on April 23 rejected the Union's request not to implement that new policy and to submit the issue to the parties' current collective bargaining negotiations; and that, after implementing the new policy on April 24. the Company discharged 30 employees between May 29, 1997 and February 12, 1998, pursuant to the more stringent provisions of the new policy. (See above pp 4-6.)

The Company's failure to challenge in its brief any of the Board's factfindings constitutes a waiver, and entitles the Board to have those findings summarily affirmed. See Int'l Union of Petroleum & Indust. Workers v. NLRB, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992); Corson & Gruman Co. v. NLRB, 899 F.2d 47, 49 (D.C. Cir. 1990) (failure to raise issue in opening brief constitutes waiver). Further, standing alone, those undisputed facts clearly warranted the Board's conclusion (A 308, 313-314) that the Company violated the Act by unilaterally implementing the new attendance policy. See Teamsters Local 171 v. NLRB, 863 F.2d 946, 954 (D.C. Cir. 1988). It follows that the Board was also warranted in finding that the discharges of employees Woods, Lear, and Velasquez, and the subsequent discharges or other disciplinary action taken against at least 27 other employees pursuant to the new policy, also violated Section 8(a)(5) and (1) of the Act. See Livingston Pipe & Tube, Inc. v. NLRB, 987 F.2d 422, 429 (7th Cir. 1993)

(affirming Board's order requiring reinstatement of employees discharged and suspended pursuant to absenteeism policy that was unilaterally implemented in violation of Section 8(a)(5) of the Act). The Board's order is entitled to enforcement because, as we show below, the sole contention raised by the Company is barred by Section 10(e) of the Act (29 U.S.C. § 160(e).)

B. The Company's Sole Argument is Barred by Section 10(e) of the Act
The Company's sole contention is that its unilateral actions were pursuant
to, and privileged by, the management-rights provision of the collectivebargaining agreement that expired on March 31, prior to the unilateral change in
the attendance policy on April 24. As support, the Company emphasizes (Br 28)
that part of the provision allowing it "to adopt reasonable work rules" and "to
amend these rules from time to time." Further, the Company argues (Br 21-24)
that the management rights provision survived expiration of the 1996-1997
bargaining agreement on March 31 and, therefore, continued to shield the
Company's unilateral actions respecting work rules, such as the unilaterally
imposed attendance policy.

The Company advanced that argument to the administrative law judge in its Post Hearing Brief to Administrative Law Judge on Behalf of Ryder/ATE, Inc. (A 41-44). However, the judge (A 313), pursuant to settled Board authority, rejected it, holding that the management-rights provision did not survive the March 30

expiration of the 1996-1997 contract and, therefore, that the provision did not privilege the April 24 unilateral imposition of the new attendance rule. *See University of Pittsburgh Medical Center*, 325 NLRB 443 (1998); *Holiday Inn of Victorville*, 284 NLRB 916 (1987) ("*Holiday Inn*").

Before the Board, the Company failed to challenge the judge's rejection of its management-rights-clause defense, in either its formal exceptions or its brief in support of the exceptions. In that circumstance, consideration of the Company's contention is barred by Section 10(e) of the Act (29 U.S.C. § 160(e)): "[N]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-666 (1982) (the Section 10(e) bar precluding judicial consideration of issues not raised before the Board is "jurisdiction[al]"). Accord Alwin Mfg. Co., Inc. v. NLRB, 192 F.3d 133, 143 (D.C. Cir. 1999) (A court of appeals altogether "lacks jurisdiction to review objections that were not urged before the Board"). The statutory policy underlying Section 10(e) is intended to provide the Board with the "opportunity to consider on the merits questions to be urged upon review of its order." Marshall Field & Co. v. NLRB, 318 U.S. 253, 256 (1943). Accord Elastic Stop Nut Div. Of Harvard Ind. V. NLRB, 921 F.2d 1275, 1284 (D.C. Cir. 1990).

Indeed, far from arguing to the Board that it had no duty to bargain with the Union pursuant to the management-rights provision of the expired contract, the Company argued the exact opposite. Thus, the Company *excepted* to the judge's finding "that [General Manager] Fritz believed that the management rights clause gave him the unilateral right to alter the absentee work rules" and *faulted* the judge's "failure to find that Fritz knew he needed to negotiate with the Union over the modified attendance policy." (Exceptions 3 and 4) (A 253). The Company also *excepted* to the judge's failure to find "that Fritz stated that he knew that he needed to negotiate the modified attendance policy with the Union." (Exception 27) (A 265).

In its brief to the Board in support of exceptions, the Company provided argument in support of these exceptions. (Brief In Support Of Exceptions To The Decision Of The Administrative Law Judge On Behalf Of Ryder/ATE, Inc.) (A 268-307.) Consistent with those exceptions, the Company acknowledged to the Board its obligation to bargain over the attendance policy, and insisted that it had provided notice to the Union of the planned change in the policy. (A 283-285.) The Company argued that the absence of bargaining over the proposed change. (A 284-285.) Nowhere in its exceptions or its brief in support of exceptions did the Company contend, as it does now, that the management-rights provision survived

expiration of the 1996-1997 contract and absolved the Company of any bargaining obligation with respect to that change.

Further, the Company does not allege that the untimeliness of its argument is excusable because of exceptional circumstances. Accordingly, the Court lacks jurisdiction to consider the Company's present reliance on the management-rights provision of the expired contract. *See Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 49 (D.C. Cir. 1990)(Section 10(e) bars consideration of employer's argument that it properly withdrew recognition of union when, before the Board, it "steadfastly insisted that it had *never* withdrawn its recognition of the union").²

In the circumstances, Section 10(e) of the Act bars consideration of the sole contention advanced by the Company in defense of the unilateral actions and, therefore, the Board's otherwise uncontested findings are entitled to enforcement.

It is worthwhile to note, however, that the Company's argument is without merit. In *Holiday Inn*, 284 NLRB at 916, the Board held that it would not presume that a management rights clause survives the expiration of a contract, but rather,

² The Company also argued before the Board that economic exigencies, namely, the imposition of liquidated damages by Foothill Transit, justified its immediate unilateral imposition of the new attendance policy, citing *RBE Electronics of S.D.*, 320 NLRB 80 (1995). However, as the judge found (A 313), and the Board affirmed (A 308 n.1), the Company failed to produce sufficient evidence to support its claim. Here, the Company does not challenge the Board's holding in that regard.

would look for a clear indication from the parties that they desired that result. Since issuing its decision in *Holiday Inn*, the Board has consistently applied this rule. *See, for example, Furniture Rentors of America*, 311 NLRB 749, 751 (1993), *enforcement denied on other grounds*, 36 F. 3d 1240, 1245 (3d Cir. 1994); *United States Can Co.*, 305 NLRB 1127, 1127 (1992), *enforced*, 984 F.2d 864, 869-870 (7th Cir. 1993); *Control Services, Inc.*, 303 NLRB 481, 484 (1991), *enforced*, 961 F.2d 1568 (3d Cir. 1992) (table).

The Company relies heavily on Lustrelon, Inc., 289 NLRB 378, 387 (1988), enforced, 869 F.2d 590 (3d Cir. 1989) ("Lustrelon") in an attempt to demonstrate that the Board has unevenly applied the principles announced in *Holiday Inn*. However, as the Board explained in *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 n. 2 (1998), enforced, 182 F.3d 904 (3d Cir. 1999), Lustrelon stands solely for the proposition that an employer does not breach its Section 8(a)(5) bargaining obligation by acting pursuant to a management-rights clause contained in a contract which, pursuant to the parties' agreement, has been extended pending agreement on a successor contract. In the instant case, the parties never agreed to extend the expired contract while continuing to bargain. Under *Holiday Inn* and its progeny, the efficacy of the management rights clause "[is] limited to the time during which the contract that contains it is in effect." Holiday Inn, 284 NLRB at 916. Thus, the Company could not have relied on the

management-rights clause of the expired contract to justify its imposition of a new attendance rule.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter an order denying the Company's petition for review and enforcing the Board's order in full.

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